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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-317

WILLIAM J. WOESTENDIEK and
THE COLORADO SPRINGS SUN, INC.,
Petitioners,

v.

WESLEY W. WALKER and KATHERINE L. WALKER,
Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Respondents, Wesley W. Walker and Katherine L. Walker oppose the petition for a writ of certiorari to review the decision of the supreme court of the State of Colorado entered on June 3, 1975, in *Walker et ux.* v. *The Colorado Springs Sun, Inc. et al.*, —— Colo. ——, 538 P.2d 450 (1975).

REASONS FOR DENYING THE WRIT

This libel suit was tried and affirmed under the First Amendment Standards prescribed in *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971) and *St. Amant* v. *Thompson,* 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968). The opinion filed below by the Colorado Supreme Court contained a prospective ennunciation of the standard of liability it would require in libel suits against news media initiated by private persons, under the discretion given the State of Colorado by *Gertz* v. *Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). It would be premature for the Court to render an opinion in this case as to the adequacy of the Colorado Standard because the sufficiency of the standard is not a judiciable issue in this case. The proposed Colorado Standard was not a basis for the decision on the merits herein and is not comprehensively detailed in the Colorado Supreme Court opinion. There are, therefore, no novel First Amendment issues in this case necessitating review by this Court.

ARGUMENT

I. The Colorado Supreme Court Properly Affirmed the Award of Punitive Damages Against the Petitioners in Accord with Gertz v. Welch, 418 U.S. 323 (1974), Rosenbloom v. Metromedia, 403 U.S. 29 (1971), St. Amant v. Thompson, 390 U.S. 727 (1968) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

This case was tried to a jury during the constitutional hiatus between the advent of this Court's plurality opinion in *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971) and its majority opinion in *Gertz* v. *Welch,* 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). In the absence of other

guidance concerning the applicability of the *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), privilege to cases involving libel suits by private individuals against news media, the trial court instructed the jury in strict compliance with the *Rosenbloom* plurality opinion. The Court, while charging the jury with the knowing falsity or reckless disregard test of *New York Times Co.* v. *Sullivan, supra,* excluded the appellation "actual malice," from the instruction pursuant to the suggestion of Mr. Justice Brennan in Footnote No. 18 to his opinion in *Rosenbloom* v. *Metromedia, supra,* 52.

Although the Petitioners have vascillated on the issue, they have, themselves, during these appellate proceedings, endorsed the exclusion of the term, "actual malice," in their *Brief in Response to the Interrogatories of July 17, 1974.* 29, filed in the Colorado Supreme Court.[1]

> "[T]he term 'actual malice' is misleading and causes considerable confusion because the same term has a different meaning in the context of punitive or exemplary damages. Hence, we urge the Court to reject the term. Instead of 'actual malice,' we will hereafter refer to the 'knowledge of falsity or reckless disregard' test."

The trial court, following the imperatives of *Garrison* v. *Louisiana,* 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967) and *St.*

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[1] On July 17, 1974, the Colorado Supreme Court ordered counsel to file simultaneous briefs in response to four special interrogatories propounded by the Court. *Walker et ux.* v. *The Colorado Springs Sun et al.,* —— Colo. ——, 538 P.2d 450, 455.

Amant v. *Thompson,* 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968), further explained the standard to the jury in Instruction No. 4. (See Appendix)

> "The gist of the meaning of recklessness is that these Defendants had *a high degree of awareness that the statements published were probably false.*" (Emphasis supplied)

In *St. Amant, supra,* 731, the Court interpreted the phrase, "high degree of awareness of probable falsity," to mean the entertaining of "serious doubts as to the truth of his publication."

The Respondents presented ample evidence at trial from which the jury could reasonably find that the Petitioners had a high degree of awareness that the defamatory statements published by the Petitioners of and concerning the Respondents were probably false. Petitioner Woestendiek testified that he took a personal interest in the Petitioners' seriatim publication of articles, editorials and letters concerning the Respondents. Although he did not, himself, usually review letters for publication, Petitioner Woestendiek personally selected and published, without editing, each and every letter received by the Petitioners in response to their articles and editorials concerning the Respondents. Petitioner Woestendiek testified that he, personally, did not believe that the Respondents were disreputable profiteers in stolen property, "fences," or any of the other calumnious characterizations of them in the letters. The letters were published in the context of a misguided campaign of fourteen (14) defamatory articles, letters and editorials synergistically orchestrated by Petitioner Woestendiek to arouse public

sentiment against the Respondents to the level of his own self-proclaimed "outrage."[2]

The Colorado Supreme Court carefully reviewed the record and found that the Respondents had presented sufficient evidence to support the jurys' finding that the Petitioners had published defamatory statements of and concerning the Respondents with knowledge of their falsity or reckless disregard of their truth or falsity.

> "We hold that the evidence sufficiently supports a finding of publication of statements by the defendants, Sun and Woestendiek, with *reckless disregard* as to whether they were true (as to compensatory damages), and, with a reckless disregard of the rights and feelings of the plaintiffs (as to exemplary damages)." *Walker et ux.* v. *The Colorado Springs Sun et al., supra,* 458.

Punitive damages may be levied against news media which publish defamatory statements with knowledge of their falsity or reckless disregard thereof.

> "For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge or reckless disregard for the truth." *Gertz* v. *Welch, supra,* 349.

The Colorado Supreme Court's announcement of the standard of news media liability for the publication of false and defamatory statments of and concerning essentially private individuals was not precipitated by the facts in the instant case but by the Court's desire

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[2] See *William J. Woestendiek and the Colorado Springs Sun, Inc.* v. *Wesley W. Walker and Katherine L. Walker,* "Petition for a writ of Certiorari to the Supreme Court of the State of Colorado," No. 75-317, Appendix B, Exhibit B-4, 37a.

to prospectively apprise the citizenry of the State of Colorado standard of media liability pursuant to the latitude given to the States by *Gertz* v. *Welch, supra*:

> "It might be said that, under the result reached here, we need not adopt one or the other of the suggested standards. We feel however, that the bench, the bar and the public are entitled *now* to an announcement of the rule in Colorado on this point." *Walker et ux.* v. *The Colorado Springs Sun et al., supra,* 456.

The Court did not specifically indicate what standard of liability it would require where presumed or punitive damages were claimed.

The case at bar presents no issue as to propriety of an award of punitive damages under the Colorado Standard of *Rosenbloom* sans *St. Amant*, because the jury was properly instructed as to the media liability standards for publication of false defamatory statements with knowledge of their falsity or reckless disregard of the truth or falsity thereof of *New York Times Co.* v. *Sullivan, supra,* and *Rosenbloom* v. *Metromedia, supra,* and the subjective awareness of probable falsity or "substantial doubt" test of *St. Amant* v. *Thompson, supra,* and its verdict is amply supported by the evidence.

II. The Colorado Supreme Court Discharged Its Constitutional Obligation of Independent Appellate Examination of Respondents' Evidence as Prescribed by New York Times Co. v. Sullivan, Supra, and Rosenbloom v. Metromedia, Supra.

In *New York Times Co.* v. *Sullivan, supra,* 285, the Court incorporated the requirement of independent appellate review into the "actual malice" test formu-

lated for libel suits initiated by "public officials" against news media:

> "[T]he rule is that "we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principals of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect.'"

The Colorado Supreme Court, recognizing its constitutional obligation of independent appellate review of the Respondents' evidence, carefully perused the evidence and determined that it was not of sufficient clarity to support a finding of publication with knowing falsity or reckless disregard on the part of the reporter, Trent, but found that there was evidence of sufficient clarity to support the verdict as to the Petitioners.

The Petitioners' argument that the statement, "This is not a case, however, for us to become a thirteenth juror," was a rejection by the Colorado Supreme Court of its obligation under *New York Times Co.* v. *Sullivan, supra,* and *Rosenbloom* v. *Metromedia, supra,* to review de novo the evidence presented by the Respondents, is a fallacious distortion of the Court's meaning. Taken in context, Mr. Justice Groves' remark evidences the Court's intent not to substitute its own verdict for that of the jury upon de novo review, but rather to carefully examine the Respondents' evidence to determine if it is of sufficient clarity to support the jurys' findings of "knowing falsity or reckless disregard":

> "*New York Times* and *Rosenbloom* hold that First Amendment questions of constitutional fact com-

pel an appellate court's de novo review and that liability must be supported with sufficient clarity. This is not a case, however, for us to become a thirteenth juror. We believe there was convincing clarity to the evidence presented on behalf of the plaintiff." *Walker et ux.* v. *The Colorado Springs Sun et al.,* 459.

The Colorado Supreme Court made no finding as to the sufficiency of the evidence with respect to the existence of actual damages suffered by the Respondents because the Respondents, having satisfied the more difficult constitutional prerogatives of *Rosenbloom* v. *Metromedia, supra,* were dispensed from a showing of actual damages under *Gertz* v. *Welch, supra.* Nor is there in *Gertz* a requirement of specific de novo review of the sufficiency of evidence as to actual damages.

Nevertheless, the Respondents did produce at trial a plethora of proof of actual damages. The evidence established the receipt by the Respondents of approximately thirty (30) harassing phone calls denigrating their moral character; cursing them; threatening to bomb their shop, burglarize their home and kill them; and shouting obscenities and various malignant forms of calumny at them. Witnesses testified that the Respondents were visibly upset by the vituperative calls they were receiving. Local Colorado Springs antique dealers testified that they overheard customers and other dealers censoring the Respondents. Actual damage to the Respondents is self-evident in the Petitioners' own publication of a letter entitled, "Archaic Statute," written by Jeanne J. Moser.

> "I trust that Mr. Grove and the other *reputable* merchants in this field shall not have to suffer from this but I can say in all heart that the Cob-

> web Shop will loose my patronage."[3] (Emphasis supplied)

The Respondents' establishment reported a drop in earnings after the publications in a year that was generally good for antique dealers in Colorado Springs. Their tax returns depicted an ascending curve of net profit of Four Thousand Seventy Dollars ($4,070.00) in 1968 to Six Thousand Ninety-nine Dollars and Thirty-three Cents ($6,099.33) in 1971. In 1972, the year of the Petitioners' publications, the Respondents' net profit fell to Three Thousand Six Hundred Fifty-five Dollars and Thirty-six cents ($3,655.36).

The Colorado Supreme Court faithfully discharged its constitutional obligation of independent appellate review of the Respondents' evidence and properly determined that it was sufficient to support the jury's verdict of knowing falsity or reckless disregard on the part of the Petitioners and, although not constitutionally required for recovery in this instance, the Respondents have produced an abundance of evidence establishing actual damages to them as a result of Petitioners' pubilications.

III. There Is No Logical, Constitutional Reason for Immunizing a Publisher From Liability for False and Defamatory Statements of Fact Contained in Newspaper Editorials or Letters to the Editor.

False and defamatory statements of fact contained in newspaper editorials and letters to newspaper editors deserve no greater protection than libelous statements of fact appearing on the news pages. There is no constitutional value in false statements of fact. *Gertz* v. *Welch, supra,* 340. The Petitioners suggest

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[3] See Id., Appendix B, Exhibit B-6, 42a.

that because newspaper editorials and letters to the editor are reflections of the opinions and beliefs of their writers, that they do not contain statements of fact:

> "On the one hand, opinions arise from beliefs, not facts, and the threat of liability will thereby produce only more conservative, and less stimulating, opinions, not better researched or more accurate facts. On the other hand, as the common law has recognized, statements of opinion lack the power of factual utterances to defame."[4]

Admittedly, a metaphysical argument can be made that all fact is opinion, but the practical reality is that fact is generally differentiated from opinion by the degree of certainty which a proposition is expressed by its proponent.

Opinion does not arise from belief—it is belief. When belief is stated as a certainty, it is stated as a fact. Libelous mistatement of fact in editorials and opinion letters are just as damaging to reputation as those contained in news articles.

Indeed, there is a great deal of editorializing involved in writing a news story. The selection of words, the selection of facts and even the selection of stories inherently involve subjective discrimination by the writer and to some degree reflects his opinions and biases. It is no greater burden for an editor to excise patently defamatory mistatements of fact from the editorials he writes and the letters he selects than from the news articles he prints.

To allow newspapers a carte blanche in the publication of libelous letters and editorials is to extend to

[4] Id., 18.

them an unwarranted license to destroy reputation, lives and livelihoods in exchange for the dubious luxury of making newspapers more interesting.

The removal of all restrictions upon defamatory editorials and opinion letters would so greatly enhance the power of news media as to retard the vigorous interchange of ideas, at least those with which the news media disagree.

This Court must resist so broad and far reaching an incursion upon the rights of individuals to protection from unwaranted onslaughts upon their reputations and their privacy. Is self-restraint a realistic safeguard against so absolute and awesome a power?

The Petitioners' argument that an absolute constitutional immunization of the news media from liability for false and defamatory publications would alleviate "practical monopolization of the media" without prejudicing the protection of reputation is sophistical and naive. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 41 L.Ed.2d 730, 94 S.Ct. 2831 (1975), this Court sharply limited the right of individual access to the media. An absolute constitutional shield from defamatory liability will not insure greater access to the media, because the decision to publish or not will still rest with the media. The pejorative effect of such a shield upon the protection of reputation is self-evident.

Mr. Chief Justice Warren warned in his concurring opinion in *Curtis Publishing Co.* v. *Butts, supra,* 170:

> "Freedom of the press under the First Amendment does not include absolute license to destroy lives and careers."

Mr. Justice Harlan in the majority opinion in *Curtis, supra,* 161, notes that the values reflected in the right to reputation and to privacy are not yet obsolete:

> "Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse."

Gertz v. *Welch, supra,* 341, far from dispelling the States' proprietary interest in protecting the reputations of its citizens, reaffirmed the values of reputation and privacy protected under the Ninth and Tenth Amendments of the United States Constitution.

> "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehoods. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name
>
> > 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' *Rosenblat* v. *Baer.*" (citations omitted)

Editorials and letters to the editor published by news media, to the extent that they contain false and defamatory statements of fact, are as pernicious as any other form of libel and there is no legitimate reason in logic or in law to grace these particular publications with an absolute, impermeable, constitutional shield from responsibility for unwarranted and unrestrained abuse of the power of the press. Immunization of these publications would render the previous opinions of this Court endorsing the values of reputation and privacy protected by the States under the Ninth and Tenth Amendments of the Constitution, hollow and hypocritical rhetoric.

IV. The Colorado Supreme Court did not Retroactively Apply Gertz v. Welch, Supra, to the Case at Bar.

The law affecting libel suits brought by private individuals against news media has been obscure for the past eleven (11) years because of the federalization of state law by the incremental expansion of the constitutional privilege ennunciated in *New York Times Co.* v. *Sullivan, supra.*

Rosenbloom v. *Metromedia, supra,* apparently represented the high water mark of the *New York Times Co.* privilege, extending its coverage to suits brought against news media by private individuals involved in matters of public or general concern. *Rosenbloom* was a plurality opinion and its value as precedent was problematic at the time this case was tried. There were no assurances that the plurality opinion in *Rosenbloom* was or would be the law of the land. Subsequently, this Court withdrew from the *Rosenbloom* opinion in *Gertz* v. *Welch, supra,* to the extent that it allowed the States to fashion their own standard of liability for news media defamation of private individuals, within narrow guidelines. The *Rosenbloom* standard had not been adopted by the State of Colorado at the time this case was tried. The *Rosenbloom* test, being not then adopted as the law in the State of

Colorado, nor as the law of the land by a majority opinion of the United States Supreme Court, it cannot be said that the Petitioners' enjoyed privileges thereunder which were diminished by the decision of the Colorado Supreme Court below.

The trial court in this case instructed the jury under the *Rosenbloom* and *St. Amant* criteria and the Colorado Supreme Court affirmed the case under those standards and not that of *Gertz* v. *Welch, supra.* There was not, nor could there have been, a retroactive application by the Colorado Supreme Court of *Gertz* v. *Welch, supra,* such as to diminish constitutional protections previously held by the Petitioners.

CONCLUSION

The jury in this case was properly instructed as to the constitutional standards defined in *Rosenbloom* v. *Metromedia, supra,* and *St. Amant* v. *Thompson, supra,* necessary to determine news media liability for defamation of a private individual. The Colorado Supreme Court, faithfully discharging its responsibilities of independent appellate review of the evidence, found the evidence to be of sufficient clarity to support the verdict of the jury. There are no novel First Amendment issues in this case requiring the attention of the Court and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

Appendix

INSTRUCTION No. 4

Recklessness implies a higher degree of culpability than negligence. A failure to exercise ordinary or reasonable care in ascertaining the truth of published material does not, standing alone, constitute recklessness. The gist of the meaning of recklessness is that these Defendants had a high degree of awareness that the statements published were probably false.